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SUSAN LAPSLEY
Director

2007 DEC 21 AM 10:08



Date: December 21, 2007

To: Robert P. Smith, III

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 26(S)**
(CTU 07-1107-01)
(Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(B))

Petition challenging memo issued by Victim Compensation and Government Claims Board concerning the methodology for processing government claims from inmates

On November 7, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memo issued by the Victim Compensation and Government Claims Board (VCGCB), notifying inmates of a change to the methodology for processing government claims from inmates, is an underground regulation. The specific language you challenge is:

...claims from inmates received on and after November 1, 2004 must be filed in accordance with the time requirements for all other government claims.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

A rule which meets the definition of a "regulation" in Government Code section 11342.600² is required to be adopted pursuant to the APA. The memo you challenge notifies inmates that they are now required, as a result of a Third District Court of Appeal decision to file their government claims with VCGCB following the time requirements "for all other government claims." The time requirements for all other governments claims is specified in Government Code section 911.2³:

¹ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

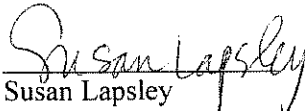
² "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

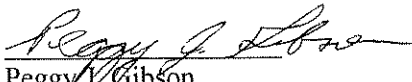
³ We note that California Code of Regulations, title 2, section 632.6, adopted by VCGCB in 1977, contains different time limits for submitting a claim to VCGCB, however these regulations have not been amended to reflect the amendment of Government Code section 911.2 in 1987 (Statutes of 1987, Chapter 1208).

(a) A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action. (b) For purposes of determining whether a claim was commenced within the period provided by law, the date the claim was presented to the California Victim Compensation and Government Claims Board is one of the following: (1) The date the claim is submitted with a twenty-five dollar (\$25) filing fee. (2) If a fee waiver is granted, the date the claim was submitted with the affidavit requesting the fee waiver. (3) If a fee waiver is denied, the date the claim was submitted with the affidavit requesting the fee waiver, provided the filing fee is paid to the board within 10 calendar days of the mailing of the notice of the denial of the fee waiver.

The memo you challenge merely requires inmates to file government claims in accordance with the existing time requirements already found in statute. The memo does not further supplement or interpret the existing rules regarding timeliness in Government Code section 911.2. This memo, therefore, is not an underground regulation.⁴

December 21, 2007


Susan Lapsley
Director


Peggy A. Gibson
Staff Counsel

⁴ For this reason, pursuant to subdivision (f)(2)(E) of section 270, a rule which is included in a statutory exemption is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
 - (A) The challenged rule has been superseded.
 - (B) *The challenged rule is contained in a California statute.*
 - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
 - (D) The challenged rule has expired by its own terms.
 - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)